

Craniofacial Surgery, P.C. v Hyman
2023 NY Slip Op 31650(U)
May 11, 2023
Supreme Court, Kings County
Docket Number: Index No. 511542/2018
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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 CRANIOFACIAL SURGERY, P.C., BROOKLYN
 MEDICAL EYE ASSOCIATES LLC,

Plaintiffs, Decision and order

- against -

Index No. 511542/2018

GEORGE F. HYMAN M.D.,
 GEORGE F. HYMAN M.D. PLLC,

Defendants, May 11, 2023

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 PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #5 & #6

The plaintiffs have moved pursuant to CPLR §3212 seeking summary judgement and to dismiss the defendant's counterclaims. The defendants have cross-moved seeking summary judgement dismissing the lawsuit and for judgement on the counterclaim. The motions have been opposed respectively. Papers were submitted by all parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, on December 28, 2012 the plaintiff Craniofacial Surgery PC entered into a contract with defendant George Hyman to purchase Brooklyn Eye Medical Associates LLC for \$650,000. The plaintiff paid an initial amount of \$200,000. Pursuant to the agreement and accompanying promissory note the plaintiff was required to pay half the outstanding amount by December 31, 2013 and the other half by December 31, 2014. The remaining balance was never paid and the defendant obtained a judgement against the plaintiff in Nassau County in the amount of \$450,000 (see, Hyman v. Golio, 134 AD3d 992, 24 NYS3d 84 [2d Dept., 2015] and Hyman v. Golio, 195 AD3d

698, 150 AD3d 282 [2d Dept., 2021]). During May 2015 the defendant began working in a medical facility nearby. The complaint alleges the defendant violated a non-compete contained within the purchase agreement and the plaintiff seeks summary judgement on that cause of action. The plaintiff further seeks summary judgement asserting the plaintiff is entitled to a return of the \$200,000 already paid and for attorney's fees and indemnification and also to indemnify the plaintiff for expenses in the Nassau County litigation. The defendants oppose the motion and have cross-moved seeking essentially to dismiss the lawsuit.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

Relevant to this motion, Article 10.2 of the purchase agreement states that "the seller shall, defend, indemnify, save and keep harmless, the Buyer...from all damages sustained or incurred...by virtue of...any inaccuracy in or breach of any

representation and warranty made by Seller in this agreement..." (see, LLC Purchase Agreement, ¶10.2 [NYSCEF Doc. No. 6]). The plaintiffs assert the defendants made false representations concerning the fact the entity was in compliance with all state and Federal laws and was compliant with all billing practices. However, the plaintiffs have not introduced any evidence eliminating any questions of fact whether the defendants made any such misrepresentations. The plaintiffs cite to the defendant's testimony in a Federal action, however, those depositions do not conclusively establish the defendant made inaccuracies in the purchase agreement. Moreover, indemnification, according to the express terms of the clause only applies to damages sustained or incurred as a result of any inaccuracies. It does not apply to the purchase price in any event. The initial payment of \$200,000 was not a damage sustained or incurred as a result of any inaccuracy. Moreover, it has already been established that the plaintiffs here maintain no ability to pursue any claims for any sort of indemnification since the right to present such claims has been foreclosed. Notably, in the prior Appellate Division decision the court held that "by the plain language of the guaranty, the defendant [plaintiff here] was precluded from raising any defenses or counterclaims relating to the underlying debt" (see, Hyman V. Golio, 134 AD3d 992, 24 NYS3d 84 [2d Dept., 2015]). Thus, the plaintiff cannot assert claims regarding indemnification, which are really claims the defendants committed

some wrong since such claims are precluded. Therefore, this portion of the motion seeking summary judgement is denied.

Likewise, the motion seeking summary judgement the defendants must indemnify the plaintiffs for costs associated with the Nassau County action is denied. It is well settled that indemnification allows a party forced to pay for the wrongdoing of another to recover such payment from the actual wrongdoer (McDermott v. City of New York, 50 NY2d 211, 428 NYS2d 643 [1980]). In this case the defendants did not commit any wrongdoing, on the contrary, the defendants prevailed in that lawsuit. The plaintiff cannot seek indemnification for a lawsuit they lost on the grounds the defendants acted in some improper manner. The vindication on defendant's behalf of that lawsuit forecloses any indemnification.

Turning to the motion seeking summary judgement for lost profits on the grounds the defendant violated the non-compete provision of the agreement, that motion is denied.

It is well settled that a party that breaches an agreement cannot thereafter assert any claims of breach of a restrictive covenant (see, Random Ventures Inc., v. Advanced Armament Corp., LLC, 2014 WL 113745 [S.D.N.Y. 2014]). There really can be no question of fact the plaintiff breached the agreement by failing to tender the payments due. As noted, that determination has been confirmed by the Appellate Division. There have been no issues raised establishing questions of fact whether the

plaintiff breached the agreement thereby foreclosing the right to pursue claims the defendant violated the non-compete clause. It has been conclusively established the plaintiff first breached the agreement relieving the strictures of the non-compete provision. Consequently, that portion of the motion seeking summary is denied. Indeed, all of the plaintiff's requests seeking summary judgement are hereby denied.

Turning to the defendant's cross-motion seeking to dismiss all claims, as noted, the claims of the plaintiff cannot be sustained. The cross-motion seeking to dismiss all the causes of action is granted. The motion seeking summary judgement on the counterclaim is granted.

So ordered.

ENTER:

DATED: May 11, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC